Supreme Court of The United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, *Petitioner,*

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

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BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE APPLICATION OF *Erie R. Co. v. Tompkins*, 304 U. S. 64 IN CONNECTION WITH QUESTION II OF THE QUESTIONS PRESENTED IN RESPONDENT'S BRIEF AND POINT III OF THE POINTS IN PETITIONER'S REPLY BRIEF

STATUTORY PROVISIONS INVOLVED

28 U.S.C.A. 1652. *State laws as rules of decision.*

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. (June 25, 1948, c. 646, 62 Stat. 944) (Based on Title 28 U. S. C., 1940 ed., Sec. 725 (R. S. Sec. 721))."

Title 72, *Workmen's Compensation, Code of Laws of South Carolina*, 1952.

"Sec. 72-101. When Acceptance of Provisions Presumed.

"Every employer and employee, except as stated in this chapter, shall be presumed to have accepted the provisions of this Title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner provided in Section 72-105.

"Sec. 72-111. Liability of Owner to Workmen of Subcontractor.

"When any person, in this section, and sections 72-113 and 72-114 referred to as 'owner', undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and sections 72-113 to 72-116 referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him."

"Sec. 72-114. Construction When Proceedings are Against Owner or Contractor.

"When compensation is claimed from or proceedings are taken against an owner or contractor then, in the application of this Title, reference to the owner or contractor shall be substituted for reference to the subcontractor, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the subcontractor by whom he is immediately employed."

"Sec. 72-121. Employee's Rights Under Title Exclude all Others Against Employer.

"The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or

death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

"Sec. 72-123. Only One Remedy Available.

"Either the acceptance of an award under this Title or the procurement and collection of a judgment in an action at law shall be a bar to proceeding further with the alternate remedy."

1952 *Code of Laws for South Carolina*, Chapter 15, Rural Electric Cooperative Act.

"Sec. 12-1021. For What Purpose Organized.

"Cooperative non-profit membership corporations may be organized under this chapter for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas."

"Sec. 12-1025. Powers of Cooperative.

"In addition to the powers conferred on all private corporations by Sec. 12-101 a cooperative shall have power:

"(5) To construct, purchase, take, receive, lease as lessee or otherwise acquire, to own, hold, use, equip, maintain, and operate and to sell, assign, transfer, convey, exchange, lease as lessor, mortgage, pledge or otherwise dispose of or encumber electric transmission and distribution lines or systems, electric generating plants, electric refrigeration plants, lands, buildings, structures, dams, plants and equipment and any and all kinds and classes of real or personal property whatsoever which shall be deemed necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized;

"(8) To construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including, without limitation of the generality of the foregoing, all roads, highways, streets, alleys, bridges and causeways, and upon, under and across all publicly owned lands, subject, however, to the requirements in respect to the use of such thoroughfares and lands that are imposed by the respective authorities having jurisdiction thereof

upon corporations constructing or operating electric transmissions and distribution lines or systems;

"(10) To conduct its business and exercise any or all of its powers within or without this State; and

"(11) To do and perform any and all other acts and things and to have and exercise any and all other powers which may be necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized."

SUMMARY OF ARGUMENT

I.

QUESTION II IN RESPONDENT'S BRIEF ON MERITS

The instant action is a diversity case in which Petitioner's right to maintain his alleged cause of action under common law must be determined under the provisions of the Workmen's Compensation Statute of the State of South Carolina and the decisions of the South Carolina Supreme Court construing the same. In resolving the question, it was the District Court's duty, under the decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 and, under other Federal decisions applying the doctrine therein announced, to follow the decisions of the South Carolina Supreme Court in construing the statute. Under the said decisions, it was the Court's duty to search for and to apply the entire body of South Carolina substantive law governing the question in state courts.

Since the construction of a South Carolina Statute was involved, even under the decision in the case of *Swift v. Tyson*, 41 U.S. 1; 10 L. Ed. 865, the Court was bound to follow the decisions of The South Carolina Supreme Court construing and applying the statute. The Erie decision, and the other Federal decisions which have applied the Erie doctrine, rest on the sound and just concept that rights under the laws of the state are the same whether enforcement is had in the State or in Federal Courts. Petitioner's action would have been barred in the State Courts of South Carolina; a fortiori, it is barred in the Federal Court.

It is generally held that where a Federal Court's jurisdic-

tion in negligence cases is based solely on diversity of citizenship of the parties, the law of the State where the accident occurred, as to the rights and remedies of the litigants, is controlling.

At a pre-trial conference in the District Court, Petitioner's counsel stipulated that if he, the Petitioner, was the statutory employee of Respondent, within the meaning of the South Carolina Workmen's Compensation Statute when he sustained his injuries, his exclusive remedy was under the statute.

In order to resolve the question presented in the instant case, of whether Petitioner sustained the injuries of which he complains while engaged in work which constituted a part of Respondent's business, the South Carolina Workmen's Compensation Statute must be construed by applying the decisions of the South Carolina Supreme Court which have construed and applied it. The issue thus presented raises a question of law for the Court and not an issue of fact for the jury.

In construing the statute, the South Carolina Supreme Court has repeatedly declared that its basic purpose is the inclusion of employers and employees and not their exclusion and that doubts must be resolved in favor of inclusion rather than exclusion; that the true test is, in determining whether an employee of a subcontractor was engaged in work which constituted a part of the owner's business, was the employee doing something for the subcontractor which bore some reasonably direct relationship to the performance of work undertaken by the owner (otherwise called the principal contractor); that there is no distinction between coming under the statute voluntarily and coming under it compulsorily; that the owner is liable to the employees of the subcontractor for benefits under the statute, if injured while engaged in work which constitutes a part of the owner's business and that such employees are restricted to their rights of claim for compensation and cannot sue the owner for damages under the common law.

The decisions of the South Carolina Supreme Court, without exception, are in line with and support the decision of the Court of Appeals herein, as do authorities in other

jurisdictions wherever similar workmen's compensation statutes have been considered.

II.

POINT III. IN PETITIONER'S REPLY BRIEF

At the pre-trial conference in the District Court, above referred to, the Petitioner moved that Respondent not be allowed to read its affirmative defense under the Workmen's Compensation Statute to the jury on the ground that it was a legal defense, a question of law for the Court. The motion was granted and there was no appeal from the ruling. It thus became the law of the case. Having moved to exclude the defense from the jury, even if a jury question had been raised by it, which was not, the Petitioner elected not to claim the right to a jury trial of the issue by his own motion and thereby waived the right.

The meaning of the language in the Workmen's Compensation Statute that "when any person, * * * referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person, * * * (referred to as 'subcontractor') for the execution or performance by or under such contractor of the whole or any part of the work undertaken by such owner," can only be determined and applied by one who is learned in the law. The language has a special technical and legal significance which can be only gathered from a careful study of the decisions of the South Carolina Supreme Court construing it and can be applied to a special set of facts only by one who has in mind and understands the entire body of the law and its proper application to the special facts. Such determination and application is a Court function, not a jury function.

The South Carolina Supreme Court has repeatedly declared that the South Carolina Workmen's Compensation Statute was enacted primarily for the benefit, protection and welfare of working men and his dependents, to relieve them of the uncertainties of a trial in a suit for damages; to cast upon the industry in which they are employed a share of the burden

resulting from industrial accidents and to prevent the burden of injured employees and their dependents becoming charges on society; that the statute is in derogation of, or departure from, the common law and is not amendatory, cumulative or supplemental thereto, nor declaratory thereof, but wholly substitutional in character; that the statute is not compulsory; that either the employer or the employee may elect not to be bound by its provisions; that both are bound by its provisions, unless notice be given to the contrary prior to injury or death; that as to disputed facts, which do not go to the jurisdiction of the Industrial Commission, the Circuit Courts and the Supreme Court of the State are bound by the Commission's finding; but where the question is whether or not the jurisdictional fact exists entitling the claimant to be heard before the Commission, the Courts have a right to review the action of the Commission, even to the extent of finding the fact to be other than the Commission found.

If the instant action had been brought in the State Courts of South Carolina, the Petitioner would not have been entitled to have and would not have had a jury determination of Respondent's affirmative defense. He was not and is not entitled to such determination of the defense in the Federal Court under numerous decisions hereinafter listed and discussed.

ARGUMENT

QUESTION II—RESPONDENT'S BRIEF

THE QUESTION OF WHETHER PETITIONER'S INJURIES WERE SUSTAINED WHILE HE WAS ENGAGED IN WORK WHICH CONSTITUTED A PART OF RESPONDENT'S BUSINESS, TRADE OR OCCUPATION CONSTITUTED A QUESTION OF LAW FOR THE COURT AND NOT AN ISSUE OF FACT FOR THE JURY.

The decisions of the South Carolina Supreme Court, cited in Respondent's Brief on Merits herein, which construe and apply the pertinent provisions of the South Carolina Workmen's Compensation Law, make it abundantly clear that when Petitioner sustained his injuries, he was engaged in work which

constituted a part of Respondent's business under the provisions of the said law.

A. IN DIVERSITY CASES FEDERAL COURTS MUST FIND THE APPLICABLE LAW.

The present action is properly termed a diversity case and *Erie R. Co. v. Tompkins*, 304 U. S. 64, requires that federal courts in the exercise of their diversity jurisdiction follow binding state court decisions, under the doctrine of *stare decisis*, just as state courts must follow them. In *Guaranty Trust Co. v. York*, 326 U. S. 99, 108, it was held that the duty of the federal courts to follow state decisions on substantive law was the same as that of state courts:

> "Here we are dealing with a right to recover derived not from the United States but from one of the states. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a state court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the state, it cannot affect recovery if the right to recover is made unavailable by the state nor can it substantially affect the enforcement of the right as given by the state."

It is now well established that in diversity cases, the Erie doctrine extends to the general field of decision the rules theretofore applicable to decisions interpreting state statutes or matters of local law. In *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 209, it was held:

> "The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state

court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law."

B. THE FEDERAL COURTS HAVE ALWAYS BEEN BOUND TO FOLLOW STATE DECISIONS AS TO INTERPRETATION OF STATE STATUTES.

We further submit that the instant case involves the interpretation of a state statute and in this respect the federal courts have always been bound to follow state decisions. In *Swift v. Tyson,* 41 U.S. 1; 10 L. Ed. 865, it was held that "laws" as used in the statute (Section 34 of the Judiciary Act of 1789, 28 U. S. C. = 725, 28 U. S. C. A. = 725; 28 U. S. C. A. 1652) did not embrace decisions of local tribunals but had reference "to the positive statutes of the state, and the construction thereof adopted by the local tribunals. . . . . ." It must be conceded that the Erie case broadened the existing rule and thereafter the words "the laws" in the aforesaid statute have been held to include in their meaning the state court decisions. The Respondent contends here that in diversity cases federal courts may not entertain suits which may not be brought in state courts or are barred by defenses controlling in state courts. The decisions applying the rule of *Erie v. Tompkins* appear to rest on the fundamental concept that rights under the laws of the state are the same whether enforcement is had in the state or federal jurisdictions.

C. THE PETITIONER PREVIOUSLY CONTENDED THAT THE ISSUE HERE INVOLVED A QUESTION OF LOCAL SUBSTANTIVE LAW OF SOUTH CAROLINA.

We call the attention of this Court to the subhead on Page 28 of Petitioner's Brief on Merits which reads as follows: "C. The record is void of the evidence required by South Carolina law to render applicable the Workmen's Compensation Act as a defense." Thereafter on Page 31 of Petitioner's Brief on Merits he makes the assertion that: "The ruling of the Chief Judge of the District Court for the Western District of South Carolina, Hon. C. C. Wyche, involved a question of local substan-

tive law of South Carolina." Then on Page 32, the Petitioner argues that, "The Court below, not having among its members a South Carolina lawyer, in reversing the action of the Chief District Judge, contrary to the accepted and usual course of judicial review, did not give weight to the judgment of the District Judge on a question of local law of a state . . . . ." After citing cases, the Petitioner argued in this same paragraph 'Appellate Courts should be slow to impute to trial courts a want of perspicacity in determining the local law, ..." It is apparent from the above pages of Petitioner's Brief on Merits that he contended the question to be one of local substantive law of South Carolina as long as the ruling by the District Judge was in his favor. However, the Court below decided that the District Judge was in error as to his construction of the South Carolina law, and Respondent contended in Question II of his argument that the issue at bar constituted a question of law for the Court and not an issue of fact for the jury. We submit that the Petitioner was unable to find decisions of the South Carolina Supreme Court to support his position and thus Petitioner ventured forth on a new course in his Reply Brief and contended in Point III that the issue at bar is a "procedural question."

D. APPLICABLE DECISIONS OF THE SOUTH CAROLINA SUPREME COURT.

We cite the following decisions of the South Carolina Supreme Court which have construed and applied the foregoing provisions of the South Carolina Workmen's Compensation law:

Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S. E. 2d 825, is considered the landmark case in South Carolina and here it was held that where an owner undertakes to perform work which is a part of his trade, business or occupation and contracts with sub-contractor for performance of such work, the owner shall be liable to pay to any workman employed in the work, any compensation which the owner would have been liable to pay if the workman had been immediately employed by the owner. It was held that the plain interpretation of the language of the statute was to make the term "owner" to be synonymous with the principal contractor, and the principal

contractor is rendered liable to injured employees of the sub-contractor. In this case it was further held that if the facts bring the case within the terms of the Compensation Act, the employee is restricted to his right of claim for compensation under the Act and this interpretation of the South Carolina Statute deprives an injured employee of his right to sue for damages under the common law. Also, the right to Workmen's Compensation is wholly statutory, not existing except under the circumstances provided in the Workmen's Compensation Acts.

In *Boseman v. Pacific Mills, et al,* 193 S.C. 479, 8 S.E. 2d 878, the South Carolina Court held the painting of a water tank used as an integral part of cotton mill business, for protection against fire, under contract whereby mill furnished materials and retained right of inspection and approval though contractor would furnish tools, ropes and rigging, was such a part of the mill's "trade, business or occupation" as to constitute the contractor a "sub-contractor" and render the mill liable for compensation for death of a workman employed to do the painting, in explosion of the tank.

In *Smith et al v. Fulmer,* 198 S.C. 91, 15 S. E. 2d 681, it was held that the true test is, "Was the employee doing something for the sub-contractor which bore some reasonably direct relationship to the performance 'of the work undertaken' by the contractor?"

In *Hopkins v. Darlington Veneer Co., et al,* 208 S.C. 307, 38 S.E. 2d 4, the South Carolina Supreme Court concluded that when dealing with one who is not an employee of the owner but the employee of the person who is performing a part of the trade, business or occupation of the owner, the guidepost in a compensation proceeding is whether or not that which is being done is or is not a part of the general trade, business or occupation of the owner, and it matters not whether the employee under such circumstances be the employee of the owner or a sub-contractor. In this case the South Carolina Court also held, "We are unable to draw a distinction between an employer who elects to come within the terms of the Act and one who is compulsory thereunder. Both are covered by the Act. To make the

distinction . . . would penalize an employer electing to come within the terms of the Act."

The basic purpose of the Compensation Act is the inclusion of employers and employees and not their exclusion, and doubts of jurisdiction must be resolved in favor of inclusion rather than exclusion. *Yeomans v. Anheuser-Busch, Inc.*, 198 S.C. 65, 15 S.E. 2nd 833; *Kennerly, et al v. Ocmulgee Lumber Co., et al*, 206 S.C. 481, 34 S.E. 2d 792.

E. SUPPORTING AUTHORITIES FROM OTHER JURISDICTIONS.

The decisions of the South Carolina Supreme Court without exception support the position of the Respondent here and authorities of other jurisdictions do likewise when comparable provisions of Workmen's Compensation Acts in those jurisdictions have been considered. *Fox v. Fafnir Bearing Co.*, 107 Conn. 189, 139 A. 778; *Continental Casualty Co. v. Haynie, et al*, 182 Ga. 60, 186 S.E. 683; *Olsen v. Canter*, 93 Ind. APP. 150, 176 N.E. 27; *Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 153 S.E. 591; *Isthmian S.S. Co. of Delaware v. Olivieri, et al*, (CCA 5th) 202 F. 2d 492; *Purkable v. Greenland Oil Co.*, 122 K. 720, 253 Pac. 219; *Berry v. Atlantic Greyhound Lines, Inc.* (C.A. 4th) 114 F. 2d 255, 30 F. Supp. 188; *Doane v. E. I. DuPont de-Nemours & Co.*, (C.A. 4th) 209 F. 2d 921. Also, we refer to *Clarence Hudson v. Horry Electric Cooperative Inc.*, as printed in the Appendix to the Brief on Merits for Respondent.

F. THE ISSUE CONSTITUTED A QUESTION OF LAW AND NOT AN ISSUE OF FACT.

The Court below held that the rights and remedies granted by the statute to an employee exclude all other rights and remedies of the employee as against his employer at common law or otherwise, on account of injury, (1952 South Carolina Code of Laws, 72-121); and the acceptance of an award under the statute or the procurement and collection of a judgment in an action at law is a bar to proceeding further with the alternate remedy. (1952 South Carolina Code of Laws, 72-123). The Respondent contends that the issue here arises under the provisions of the South Carolina Workmen's Compensation Law

and constituted a question of law for the Court and not an issue of fact for the jury.

We again refer to the conference with the District Judge immediately preceding trial and the stipulation by Petitioner's counsel that if Petitioner was an employee within the meaning of the Act, his exclusive remedy was proceeding under the Workmen's Compensation Act (R. 1). Also, in this conference when the stipulations were being made as to the defense under Workmen's Compensation, counsel for Respondent stated, "... the only question that would be left is: In the meaning of the Workmen's Compensation Act, was the Plaintiff the employee of Blue Ridge Electric? That would be the only question left." The counsel for Petitioner replied, "That's correct" (R. 4).

The recently decided case of *Adams v. Davison-Paxon Co.*, 230 S.C. 532, 96 S.E. 2d 566, expressly held:

> "It has been consistently held that whether the claim of an injured workman is within the jurisdiction of the Industrial Commission is a matter of law for decision by the Court, which includes the finding of the facts which relate to jurisdiction." *Knight v. Shepherd*, 191 S.C. 452, 4 S.E. 2d 906; *Tedars v. Savannah River Veneer Company*, 202 S.C. 363, 25 S.E. 2d 235, 147 A.L.R. 914; *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E. 2d 872; *Miles v. West Virginia Pulp & Paper Co.*, 212 S.C. 424, 48 S.E. 2d 26; *Watson v. Wannamaker & Wells, Inc.*, 212 S.C. 506, 48 S.E. 2d 447; *Gordon v. Hollywood-Beaufort Package Corp.*, 213 S.C. 438, 49 S.E. 2d 718; *Holland v. Georgia Hardwood Lbr. Co.*, 214 S.C. 195, 51 S.E. 2d 744; *Younginer v. J. A. Jones Const. Co.*, 215 S.C. 135, 54 S.E. 2d 545; *Horton v. Baruch*, 217 S.C. 48, 59 S.E. 2d 545.

The Respondent has stated above that under the doctrine established in *Swift v. Tyson*, supra, the Federal Courts were under obligation to follow State decisions in their interpretation of State statutes. This also applied with regard to property rights and other matters of a strictly local character. The issue at hand involves the interpretation of the South Carolina Workmen's Compensation Law and the doctrine established by the

South Carolina Supreme Court is unequivocally set forth in *Adams v. Davison-Paxon Co.*, supra, and the South Carolina decisions cited therein. It cannot be disputed that the *Erie* case broadened the existing rule as to local law and the application of the Erie doctrine requires the conclusion that the question of whether Petitioner's injuries were sustained while he was engaged in work which constituted a part of Respondent's business, trade or occupation constituted a question of law for the Court. The Respondent respectfully submits that question was correctly decided by the Court below and the proper application of the South Carolina decisions was made when it sustained Respondent's basic defense that Petitioner's recovery was limited to the benefits provided by the Workmen's Compensation Act of the State of South Carolina.

G. APPLICABLE FEDERAL DECISIONS.

The Petitioner seeks to recover against Respondent at common law and any right he might have had to recover has been made unavailable by the State of South Carolina in its enactment of its Workmen's Compensation Law and the acceptance by Petitioner of benefits thereunder. It is generally held that where Federal Court's jurisdiction in a negligence case is based solely on diversity of citizenship of the parties, the law of the State where the accident occurred must control. *Westland Oil Co. v. Firestone Tire & Rubber Co.*, C.C.A.N.D. 1944, 143 F. 2d 326. See, also, *Reeves v. Philadelphia Import Co.*, C.C.A. Pa. 1945, 150 F. 2d 854; *Capetola v. Barclay White Co.*, C.C.A. Pa. 1943, 139 F. 2d 556, 153 A.L.R. 1046, certiorari denied 64 S. Ct. 939, 321 U.S. 799, 88 L.Ed. 1087; *Moore v. Chicago, B. & Q. R. Co.*, D.C. Mo. 1939, 28 F. Supp. 804.

In *Warlich v. Miller*, (C.A. 3rd) 141 F. 2d 168, it was held that the tort law of the State in which operative facts occurred and in which suit for personal injuries was brought in Federal Court controlled the rights and liabilities of the litigants. Also, in a tort action in Federal Court, the law of the State in which the alleged tort was committeed was determinative of existence of a legal injury. *Vancouver Book & Stationery Co. v. L. C. Smith & Corona Typewriters*, C.C.A. Or. 1943, 138

F. 2d 635, certiorari denied 64 S. Ct. 780, 321 U.S. 786, 88 L. Ed. 1077.

In *Northern Pacific Ry. Co. v. Meese*, Wash. 1916, 36 S.Ct. 223, 239 U.S. 614, 60 L. Ed. 467, this Court held that the Federal Courts must accept the conclusion of the highest State Court that the Washington Workmen's Compensation Act, Wash. Laws 1911, ch. 74, took away an existing right under Rem. & Bal. Code, §§ 183, 194, to maintain an action for the wrongful death of an employee, not only as against the employer, but as against any third person by whose negligence the death may have been caused, where the employee sustained the fatal injury while engaged about his ordinary duties at his employer's plant.

Also, in determining whether employee of Texas employer could maintain common law action for injuries on ground that employee did not receive his injury in course of his employment, and hence was not within Texas Compensation Law, *Vernon's Ann. Civ. St.* art. 8306, § 3; art. 8309, § 1, second subd. 4, the law of Texas applied. *Johnson v. Bederman*, C.C.A. Ill. 1945, 149 F. 2d 515.

In considering the legal relationship and liability of employer to employee and relationship of third party tort feasor to employee and to employer, arising out of employee's death in West Virginia, Federal Court must examine *West Virginia Workmen's Compensation Act, Code W. Va.* 1931, 23-1-1 et. seq., and West Virginia decisions applicable to it and to the principle of common-law subrogation. *Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry. Co.*, C.C.A. W. Va. 1940, 115 F. 2d 277, certiorari denied 61 S.Ct. 807, 312 U.S. 702, 85 L.Ed. 1135.

There are numerous Federal decisions fully supporting the position of Respondent that the State Supreme Court's construction of its Workmen's Compensation Act is binding on the Federal Court. Among these decisions are:

Vandenbark v. Owens-Illinois Glass Co., 61 S. Ct. 347, 311 U. S. 538; *Bagnel v. Springfield Sand & Tile Co.*, (C. A. 1), 144 F. 2d 65, certiorari denied 65 S. Ct. 72, 323 U. S. 735; *Waldron v. Aetna Casualty & Surety Co.*, (C. A. 3) 141 F. 2d 230; *Funk*

v. Hawthorne, (C.A. 3), 138 F. 2d 686; *Travelers Ins. Co. v. Burden*, (C. A. 5), 94 F. 2d 880; *Mobile & O. R. Co. v. Industrial Commission of Illinois*, (C. A. 7), 28 F. 2d 228; *Warlop v. Western Coal & Mining Co.*, (C. A. 10), 24 F. 2d 926; *Delaware Coach Co. v. Savage*, D. C. Del. 1946, 68 F. Supp. 175.

H. THE WORK BEING DONE WAS A PART OF THE TRADE AND BUSINESS OF RESPONDENT.

If the operations of respondent are examined in the light of the above cited decisions of the South Carolina Court, which have construed and applied the provisions of the South Carolina Workmen's Compensation Law, it is clear that petitioner sustained the injuries complained of while engaged in work which constituted part of respondent's trade and business and that his only remedy is under the provisions of the South Carolina Workmen's Compensation Law. The construction, the reconstruction, the maintenance, the repair work, carried on by respondent on its system, is so involved in the normal and effective operation of the system as to make the same an important and essential part of its business operations under the provisions of the South Carolina statutes quoted at the beginning of this Brief.

The construction and operation of an electric distribution system is in no sense comparable to the construction and use of a building as a store or manufacturing plant, as argued by petitioner in his Reply Brief. An electric distribution system is by nature and within itself operational in character as its component parts are expendable, some of them being necessarily short lived. In the very nature of things, such a system can never be completely constructed. Additions must be made to and alterations must be made in it from day to day to enable it to meet an increasing public demand for power. Because of the unique nature and character of an electric distribution system, because of the fact that construction work on the system must be continuous and never ending, the South Carolina General Assembly provided in the Cooperative Act under which respondent was organized, that electric cooperatives shall have power to carry on construction work on systems as part of their

operations (1952 *Code of Laws for South Carolina*, 12-1025 (5) (8) (10) (11)).

The major problem of an electric cooperative, the purpose of and justification for its existence, is the delivery of electric energy to consumers, existent and potential. Implicit in its operations is construction work, original construction, alterations, and re-construction. Mr. E. V. McMahon, the Chief Engineer of Southern Engineering Company of Atlanta, Georgia, who designs and has general supervision over all of respondent's construction work, testifying in the District Court with respect to such work, said:

> "The cooperative is constantly engaged in construction work. They are constantly building new lines to new consumer members, of various lengths, some short, some long, depending on the circumstances and the location of the consumers with regard to the existing system. * * * The construction crews of the Blue Ridge Electric Cooperative are constantly doing construction work. These Blue Ridge Electric Cooperative crews are faced with the problem daily of building new construction to new consumer members, at various distances from the existing line." (R.45).

During the comparatively short period of its existence prior to the trial of the action herein in the District Court, respondent has constructed approximately 1700 miles of line, constructing and installing in connection therewith necessary appurtenant new facilities, to serve approximately 9300 new members. Although it kept a crew of eight linemen and eight groundmen busily engaged in construction and repair work, at times the respondent found it impossible to keep up with all needed construction with its own workmen. At such times, it let special contracts for portions of the work, such as that called for in the Bouligny contract in the case before this Court. Even when construction work is done by contract, there are many details in connection with it to claim the attention of respondent and to require action on its part, such as arranging for the making of plans and specifications for the work, the securing of rights-of-way and franchises, the application for the purchasing and handling of materials used on the project, the checking

of reports filed by the contractor and the engineer, and the disbursement of funds as the work progresses. With further reference to work done by respondent's employees, Mr. McMahon, the engineer, said:

> "The cooperative also has to maintain their existing transmission system. By that I mean replacing insulators and stringing in new wire, due to lightning damage or other operating hazard. The cooperative also finds it necessary to work in their sub-stations, re-setting breakers, re-working damaged equipment and/or supervising it, and re-setting existing regulators." (R.45).

In building its distribution system, original lines and facilities are so designed by the engineer for each community in respondent's territory as to reasonably meet the needs of such community. Since completing this original construction, however, the system growth has been so rapid, and so great, that with the passing of years, the lines and facilities have become inadequate, first in one community and then in another. Wherever and whenever this has occurred, it has been necessary to re-work and/or re-build or replace such lines and facilities including sub-stations.

When testifying with respect to this phase of respondent's work, Engineer McMahon said:

> "They also in many instances find it necessary to 'heavy up' as we call it, or increase the load capacity of their existing system to handle power loads." (R.45).

Most of the work called for in the Bouligny contract was to heavy up parts of respondent's system. 87.69 miles of line and appurtenant facilities were re-worked and/or re-built or replaced under the contract, as against only 24.19 miles of new line construction. The Walhalla sub-station was constructed under the contract to deliver a power load for the Ebenezer community of 44,000 KW as against 7,200 KW then available to the community. The Ebenezer line, on which petitioner was working when he sustained his injuries, was changed from a one-phase to a two-phase line under the contract. The change

involved the running of a second line on cross-arms along the existing Ebenezer line, with a few minor changes of location being made in the two-phase line. The petitioner was attempting to extend the Ebenezer line into the sub-station when he received his injuries. At this time the Ebenezer line was connected to an insulator on the outside of the sub-station. The line was energized but no part of the sub-station was. No energy was feeding into the sub-station. The petitioner reached out of the sub-station and caught or touched the Ebenezer line when attempting to make a measurement to determine the length of an extension needed to bring the Ebenezer line into the sub-station. Throughout all the briefs filed herein, petitioner has studiously avoided any reference to the work in which he was directly and actually engaged at the time of his injuries. On pages 14 and 15 of his Reply Brief and on pages 10 and 11 of his Brief on Merits, he does, however, inadvertently concede that line work, at least, constitutes a part of respondent's business.

In his unrestrained zeal, petitioner even goes so far in his Reply Brief as to assert there is no evidence in the Record to show that sub-stations are necessary facilities in respondent's operating system and complains that the evidence does not show what purpose sub-stations serve in the system. The evidence shows that respondent had six sub-stations in use at the time of the trial of the case in the District Court. It shows that the sub-stations, whose construction was called for in the Bouligny contract, were designed for respondent by Mr. McMahon, a highly trained skilled engineer of vast experience. The specifications for the construction of the double circuit distribution system leading out of one of the sub-stations were prepared by respondent's construction superintendent. (R.44). The evidence further shows that the National Rural Electrification Administration approved the construction of the sub-stations; as designed by the engineer and in keeping with his specifications and that it lent respondent thousands of dollars to defray the cost of the sub-stations. What more evidence could be wanted as to their need?

When respondent's day to day operations are reviewed in

all of their phases and parts, in their entire nature and scope, the conclusion is inescapable that construction work in its various aspects is as much a part of respondent's job as is the delivery of electric energy to consumers, because the two are inseparable. Respondent's requirements and operations are not unique in the field of electric distribution. The same pattern of operation is followed by other electric cooperatives and, no doubt, by private utilities as well.

The Court below, after a careful documentation of all facts and circumstances relating to jurisdiction pursuant to application of the Workmen's Compensation Act, concluded that the work performed by the Bouligny Construction Company under the contract was done in carrying on the trade or business of the cooperative. The other requirements of this defense were expressly admitted into the Record by petitioner in the District Court including the admission that after the injury, petitioner had accepted and received full compensation benefits. The issue in this defense involved substantive law of South Carolina which was clearly and correctly applied in the opinion of the Court below.

POINT III IN PETITIONER'S REPLY BRIEF

It would appear that in his Point III, the Petitioner would contend the basic issue here to be a procedural matter governed by the Federal Rules of civil procedure and not a question of law that has been decided by the South Carolina Supreme Court. The respondent submits that the issue constitutes a question of law and there can be no doubt about how the question has been previously decided by the highest court in South Carolina.

A. MODE OF TRYING ISSUE, RAISED BY RESPONDENT'S AFFIRMATIVE DEFENSE UNDER WORKMEN'S COMPENSATION STATUTE, DETERMINED IN DISTRICT COURT ON PETITIONER'S MOTION PRIOR TO TRIAL.

At the conference immediately preceding trial in the District Court held at chambers by the Trial Judge, the petitioner made a motion to exclude from the jury's consideration the respondent's affirmative defense that petitioner's action was bar-

red under the provisions of the South Carolina Workmen's Compensation Law. *This motion was granted.* At the conference, the District Judge re-stated the motion made by Petitioner as follows: "* * * You are moving that they not be allowed to read that defense before the jury because it is a legal defense, purely a question of law and must be decided on legal grounds? Is that what you are moving for?" Petitioner's counsel replied, "That is the first motion." (R.2) In granting the motion, the Court said (R. 4, 5):

> "You are willing, then, as I understand, to admit —not to be published before the jury, but for the purpose of any motion made upon the law in the case— you are willing to admit he did receive compensation in the amount he did receive?"
> Mr. Hammer: "Yes, sir."
> The Court: "On the record, but not in the presence of the jury." * * *
> * * * * *
> The Court: "I am going to let you prove anything you want to prove outside the presence of the jury on this Workmen's Compensation Act. As far as the trial of this case before the jury is concerned, as I said before, it's dwindled into a very narrow issue, as I see it. I may be wrong. The Circuit Court of Appeals may say I am wrong. But I think as far as the Workmen's Compensation proposition is concerned, it's purely a question of law; * * * *".

There was no appeal taken from the Court's ruling on the motion and accordingly, it became the law of the case. It would have been shocking indeed if the petitioner had attempted to appeal to the Court of Appeals from the favorable ruling on his own motion. It is more shocking that petitioner should now attempt to question the favorable ruling on his own motion in this honorable Court.

If the defense had raised an issue for jury determination, as it clearly did not, the petitioner elected to withdraw the issue from the jury by his own motion and thereby waived the right to a trial of the issue by the jury, if such right had existed. The petitioner is obviously reversing his field on questions

herein from Court to Court and appears to feel that each appeal is a new trial of new issues instead of an appeal from rulings made in an inferior court.

On trial of the petitioner's alleged cause of action in the District Court, the respondent offered pertinent testimony as to the nature and scope of its operations, as to the nature and scope of the work of its employees, and as to the nature and scope of work done by respondent by contract, but in offering the testimony, respondent did not make and, under the ruling of the Court, was not permitted to make reference to workmen's compensation for any purpose. The testimony offered served a dual purpose: it had some relation to the issues raised by petitioner's alleged cause of action and it proved facts, along with other facts admitted in the record at the pre-trial conference, for the Court's determination of the affirmative defense which was a question of law and not before the jury.

B. MEANING AND APPLICATION OF LANGUAGE IN STATUTE, HAVING SPECIAL TECHNICAL AND LEGAL SIGNIFICANCE, FOR COURT, NOT FOR JURY.

It would be an innovation indeed in the law to require a jury to try an issue on facts concealed from it, as petitioner here contends for. In his Complaint, petitioner alleges a claimed right and its violation, an alleged cause of action against respondent under common law. In its Answer, respondent alleges that the claimed right is non-existent; that petitioner's only right and remedy is a substitutional right and remedy under the Workmen's Compensation Laws of South Carolina. The question thus raised is not one of procedure as now argued in this Court by petitioner. It cuts much more deeply. It is a question of substantive law of South Carolina. In order to resolve it, the South Carolina statute must be interpreted and construed which is a function reserved to the Court and not for the jury. If the petitioner's motion to have the question determined by the Court as a matter of law had not been granted, if the matter had been left open for determination without any motion prior to the beginning of the actual trial, it would have been the Court's duty to resolve the question in the absence of the

jury and without its aid upon proper motion at the close of the trial. The petitioner made a motion to strike the defense at the close of respondent's testimony and the District Judge again ruled that the issue involved a question of law. (R. 48, 49). Immediately thereafter when the petitioner failed to offer any testimony in reply, the respondent moved for a directed verdict primarily upon the grounds that petitioner's action was barred by reason of the application of the terms and provisions of the South Carolina Workmen's Compensation Statute. In due time respondent moved for judgment in favor of the defendant non obstante veredicto and upon appeal, the Court below concluded that respondent's motion for a directed verdict should have been granted and, failing this, the subsequent motion for judgment in its favor non obstante veredicto should have been granted. The Federal Courts have never hesitated to declare the law when it has become their duty to do so. The case of *Herron v. Southern Pacific Co.*, 283 U. S. 91, cited by petitioner in his Reply Brief, makes it plain that the Federal Courts will not shirk their duty to declare the law, even when a sovereign state, by constitutional provision, attempts to convert questions of law for the court into questions of fact for the jury.

C. STATUTE IN DEROGATION OF COMMON LAW AND WHOLLY SUBSTITUTIONAL THEREFOR.

In *Caughman v. Columbia Y. M. C. A.*, 212 S.C. 337, 47 S. E. 2d 788, the South Carolina Supreme Court said:

> "It was stated in *Marchbanks v. Duke Power Co. et al.*, 190 S. C. 336, 2 S. E. 2d 825, 836, that Workmen's Compensation Acts 'are in derogation of, or departures from the common law, and are not amendatory, cumulative or supplemental thereto, nor declaratory thereof, but wholly substitutional in character.' In *Tedars et al*, 202 S. C. 363, 25 S. E. 2d 235, 243, 147 A. L. R. 915, the Court said: 'To great extent the whole scheme of workmen's compensation is to place the economic burden of industrial accidents upon industry rather than upon the workers and their dependents, and as to the latter thereby rendered indigent, upon the State.' It was said in *Cokeley et al v. Robert E. Lee, Inc.*, 197 S. C. 157, 14 S. E. 2d 889,

893, that compensation laws 'were enacted primarily for the benefits, protections and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society.'"

Also, see *Hopkins v. Darlington Veneer Co., et al*, supra, where the South Carolina Supreme Court held:

> "We are unable to draw a distinction between an employer who elects to come within the terms of the Act and one who is compulsory thereunder. Both are covered by the Act."

We respectfully submit that the South Carolina law is not correctly stated by petitioner on page 19 of his Reply Brief in regard to power of the South Carolina Supreme Court to review findings of fact of the Industrial Commission or the lower reviewing court. It might be said here that the claim petitioner attempted to assert in the District Court was not for his workmen's compensation benefits which he had already accepted and been paid in full. The issue is a question of law as to whether this attempt by petitioner to assert a claim at common law has been made unavailable by the application of the workmen's compensation statutes. In *Knight v. Sheppard*, 191 S. C. 452, 4 S. E. 2d 906, the court held:

> "It is suggested that we are bound by the fact finding of the South Carolina Industrial Commission, which held that it lacked jurisdiction. It is true that as to disputed facts which do not go to the jurisdiction, we are bound by the finding of the Commission, but where the only question presented is whether or not the jurisdictional fact exists entitling the claimant to be heard before the Commission, we have a right to review the action of the Commission, even to the extent of finding the fact to be other than the Commission found it.
>
> "We are unable to perceive any sound reason why South Carolina should be denied the right to apply in our own Courts our own statute enacted in pur-

suance of State policy to provide compensation for employees suffering injury or death within the State while engaged in the course of their employment. The Workmen's Compensation Law of our State expresses our domestic policy in its application to persons and events within the State."

The question of whether employers and employees, under varying facts and circumstances, are covered under the provisions of the South Carolina Workmen's Compensation Statute or are excluded from the provisions thereof requires an interpretation and construction of the statute. The question is one of law and the South Carolina Supreme Court has so treated it time and again in a long and unbroken line of decisions, including the following: *Marchbanks v. Duke Power Company*, supra; *Knight v. Sheppard*, supra; *Boseman v. Pacific Mills*, supra; *Kennerly v. Ocmulgee Lumber Company*, supra; *Hopkins v. Darlington Veneer Company*, supra; *Caughman v. Columbia Y. M. C. A.*, supra, and *Adams v. Davison-Paxon Company*, supra. Also, we refer to the opinion of the South Carolina Circuit Court in *Hudson v. Horry Electric Cooperative*, which was printed in the appendix to respondent's Brief on Merits.

D. PETITIONER'S ACTION BARRED IN STATE COURTS—LIKEWISE BARRED IN FEDERAL COURTS.

We submit that wherever the Federal Courts have dealt with the question of whether employers and employees, under varying facts and circumstances, have been covered under or excluded from the provisions of workmen's compensation statutes of the several states, the courts have treated the question as one of law and have followed state decisions in their interpretation of the respective state statutes. In *Guaranty Trust Company of New York v. York*, supra, this Court said:

"*Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of

> the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result."
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> • • • • •
>
> "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law."

At the conclusion of respondent's evidence in the District Court when petitioner moved to strike the defense that barred his claim by reason of application of the Workmen's Compensation Act, the District Judge inquired of petitioner's counsel if they contemplated offering any testimony in reply. Also, the District Judge ruled that it was a question of law and he was holding the question open in order that respondent might include that ground in its motion for the direction of a verdict (R. 48, 49). In the light of this and in spite of it, petitioner did not see fit to offer any testimony on the question, if he had any, which he obviously did not as his counsels' statements disclosed. When petitioner's Point III in his Reply Brief is examined in the light of the record and of the basic issue involved, it is found to be without merit. Further, we emphasize that the United States Constitution does not guarantee trial by jury of questions of law which are to be decided by the Court and the question in this instance was obviously one of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitioner's injuries were sustained while he was engaged in work which constituted a part of respondent's trade and business. The question involved a matter of law for the Court un-

der the law of South Carolina pursuant to its Workmen's Compensation Statute. The doctrine of *Erie v. Tompkins* must be applied and the judgment of the Court below reversing and remanding the judgment of the District Court with direction to enter judgment for respondent should be affirmed.

Respectfully submitted,

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